

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**In re: PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION**

**MDL No. 1456
Master File No. 01-CV-12257-PBS**

Hon. Patti B. Saris

THIS DOCUMENT RELATES TO:

*United States of America ex rel. Ven-A-Care of the
Florida Keys, Inc., et al. v. Dey, Inc., et al.*, Civil
Action No. 05-11084-PBS

**DECLARATION OF NEIL MERKL IN FURTHER
SUPPORT OF DEY DEFENDANTS' MOTION TO DISMISS**

NEIL MERKL declares, pursuant to 28 U.S.C. § 1746, that:

1. I am a member of the law firm of Kelley Drye & Warren LLP, counsel for defendants Dey, Inc., Dey L.P., Inc., and Dey L.P. (together "Dey") in this action. I am admitted *pro hac vice* for the purposes of this action. I make this declaration in further support of Dey's motion to dismiss all of the claims in this action pursuant to (i) Fed. R. Civ. P. 9(b) and 12(b)(6) and (ii) 31 U.S.C. § 3731(b) and 28 U.S.C. § 2415(a)(b).

2. Dey moves to dismiss both the complaint in this action (the "U.S. Complaint" or "U.S. Compl."), filed by the United States (the "Government"), and the complaint filed by the relator, Ven-A-Care of the Florida Keys, Inc. (the "Relator" or "Ven-A-Care"), which adopts and incorporates the U.S. Complaint (the "Relator's 2006 Complaint").

3. I make this declaration from my own personal knowledge of the facts and circumstances as stated below. The source of my knowledge is my review of Kelley Drye & Warren LLP's file on this litigation, including my review of the pleadings and documents set forth herein and annexed as exhibits hereto, and documents furnished to me by my client.

4. Annexed hereto as Exhibit A is a true and correct copy of the Notice of the United States of America of Election to Intervene in Part and to Decline to Intervene in Part, dated August 22, 2006 (the "Government's Motion to Intervene").

5. Annexed hereto as Exhibit B is a true and correct copy of the Honorable Morris E. Lasker's Order, dated September 9, 2006, unsealing the Redacted Third Amended Complaint in Civil Action No. 00-10698, the Relator's 2006 Complaint, and the U.S. Complaint, and directing that copies thereof be served upon Dey (the "September 9 Order").

6. Annexed hereto as Exhibit C is a true and correct copy of the Relator's 2006 Complaint, dated October 31, 2006 and entitled "Plaintiff Ven-A-Care's Complaint Adopting United States' Complaint In Intervention Against Dey, Inc., Dey L.P., Inc. and Dey, L.P. and Requesting Additional Relief."

7. On or about December 8, 2006, the Government sent to Dey's counsel, Kelley Drye & Warren LLP, via e-mail seven (7) different redacted complaints filed in actions pending in the Southern District of Florida and in the District of Massachusetts. These papers all contain substantial redactions. It is not clear these seven pleadings encompass all of the complaints that have been filed in these actions. Ven-A-Care has stated that they first initiated its action in 1995 in the Southern District of Florida and, by amendment in 1997, added Dey as an additional defendant in that action. (*See Relator's Opposition to Dey Defendants' Motion to Dismiss*, at 1.) The Government has not sent to Dey's counsel the Ven-A-Care's complaint

allegedly filed in 1995, and other possibly relevant papers. Attached as Exhibit D is a true and correct copy of excerpts from a redacted copy of the Second Amended Complaint for Money Damages and Civil Penalties Under the False Claims Act, 31 U.S.C. 3729-3732 (the “1997 Florida Complaint”), in the action entitled *United States of America ex rel. Ven-A-Care of the Florida Keys, Inc., v. [Redacted], et al.*, No. 95-1354-CIV-Marcus, filed in the United States District Court for the Southern District of Florida, filed on or around August 13, 1997. The Government has declined to furnish Dey with the complete file of all suit papers filed in the Florida and Massachusetts actions.

WHEREFORE, I respectfully request that this Court grant Dey’s motion to dismiss in its entirety and grant Dey such other, further, and different relief as the Court deems to be just and proper.

I declare under penalty of perjury that the foregoing is true and correct.

Executed February 16, 2007.

/s/ Neil Merkl

NEIL MERKL

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered to all counsel of record by electronic service pursuant to Paragraph 11 of Case Management Order No. 2, by sending on February 16, 2007 a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ Neil Merkl

NEIL MERKL